KETUA PENGARAH HASIL DALAM NEGERI v. MEGAYEAR STRATEGY SDN BHD

HIGH COURT MALAYA, ALOR SETAR
HASHIM HAMZAH J
[CIVIL SUIT NO: 14NCVC-01-09-2015]
24 FEBRUARY 2016

REVENUE LAW: *Income tax – Refund of tax paid – Entitlement to – Appeal against decision of Special Commissioner of Income Tax ('SCIT') – Whether dividends were payable by way of cash or credit – Position prior to amendment of s. 108(1) of Income Tax Act 1987 – Whether SCIT directed minds to issues raised – Whether findings of facts by SCIT ought to be disturbed*

The respondent was an investment holding company, which was incorporated under the Companies Act 1965. The respondent also held 2.4% shares in Jelapang Jati Sdn Bhd which declared an interim dividend to its shareholders and the respondent was entitled to receive a total of RM1,056,000 gross dividend ('first interim dividend'). Shortly thereafter, Jelapang Jati again declared an interim dividend to its shareholders and the respondent was entitled to receive RM80,400 gross dividend. For the year of assessment 2007, the respondent's tax due and payable was RM271,119.25 and was expected to get a tax refund amounting to RM35,708.25 calculated under s. 110 of the Income Tax Act 1967 ('ITA'). However, the appellant refused the respondent's request for the refund of the same. Subsequently, the appellant issued Form J and two Forms S against the respondent. The respondent appealed against the assessments under the three forms. The Special Commissioner of Income Tax ('SCIT') decided in favour of the respondent and hence, this appeal by the appellant. The issues raised in this appeal were: (i) whether both dividends were paid or credited during the year of assessment 2007; and (ii) whether the SCIT failed to judicially appreciate that the burden of proof lies on the respondent to show that the assessment was excessive or erroneous in which the respondent had failed to discharge.

Held (dismissing appellant's appeal):

(1) Paragraphs 34 and 39 of the Fifth Schedule of the ITA provide that the High Court shall only hear and determine questions of law in the appeal. The findings of facts by the SCIT, as a trier of facts, shall not, as a general rule, be disturbed. (paras 29-32)

(2) The SCIT had directed their minds to the issues raised, which involved the questions and findings of facts. The SCIT found that the wordings of s. 108(1) of the ITA prior to the amendment made clear mention that dividends were payable either by way of cash or by way of credit. The appellant's allegation, that the payment of the first interim dividend was made by way of allotment of shares in year 2008, was without factual

A and legal basis and was completely rejected as it was solely based on suspicion. In the circumstances, the findings of facts by the SCIT ought not to be disturbed. (paras 38-42)

(3) The SCIT was aware that the burden to prove that the assessment was excessive or erroneous was on the respondent. The SCIT, upon perusal B of all evidence, observed that the respondent had discharged the onus of proof under para. 13 of the Fifth Schedule of the ITA. (paras 43 & 44)

Case(s) referred to:
Chua Lip Kong v. Director-General Of Inland Revenue [1981] 1 LNS 157 PC ***(refd)***
Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 C *CA* ***(refd)***

Legislation referred to:
Finance Act 2007, ss. 3, 20, 23, 40, 51
Income Tax Act 1967, ss. 108, 110, Fifth Schedule paras 13, 34, 39

D **Other source(s) referred to:**
Chong Kwai Fatt, *Malaysian Taxation: Principles and Practice*, 14th edn, p 480

For the appellant - CA Prabhakaran; M/s Praba & Assocs
For the respondent - Cindy Goh Joo Seong & Lam Kian Yip; M/s Cheang & Ariff

Reported by S Barathi

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JUDGMENT

Hashim Hamzah J:

Introduction

F **[1]** This is an appeal by the appellant against the order of the Special Commissioner of Income Tax ("SCIT") made on 14 April 2015 in favour of the respondent.

Law

G **[2]** At this juncture, for ease of reference, I find it convenient to firstly discuss on the premise that the whole appeal is based upon, before going on to the brief facts of the case.

[3] The first relevant provision is s. 108 of the Income Tax Act 1967 (Revised 1971) (Act 53) (hereinafter referred to as the "ITA 1967").

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[4] Section 108 of the ITA 1967 has been amended through s. 20 of the Finance Act 2007 (Act 683) (hereinafter referred to as the "FA 2007"). Before the amendment, the relevant part of s. 108 of the ITA 1967 in the present case reads as follows:

I Deduction of tax from dividends

108. (1) Where a dividend is paid or credited by a company to any of its shareholders in the basis period for a year of assessment, then, if the dividend is deemed by virtue of section 14 to be derived from Malaysia, **the company shall be entitled to deduct tax therefrom at the rate**

applicable to the company on the chargeable income for that year of assessment or, where there is no chargeable income of the company for that year at the rate which would be so applicable if there were such chargeable income.

(emphasis added)

[5] After the amendment, the whole of s. 108 of ITA 1967 has been substituted by the following:

Non-deduction of tax from dividend

108. Where a dividend is paid or credited by a company to any of its shareholders in the basis period for a year of assessment, **the company shall not be entitled to deduct tax from such dividend paid or credited**.

(emphasis added)

[6] The amendment to s. 108 also affected s. 110 of the ITA 1967 (setting-off for tax deduction) in which by virtue of s. 23 of the FA 2007, the word dividend and reference to s. 108 was taken out from the said provision.

[7] By way of s. 3 of the FA 2007, both the amendments shall have effect from the year of assessment 2008 onwards.

[8] Through the amendment, it is clear that now, a company paying or crediting dividends to its shareholders are not entitled to deduct tax starting from the year of assessment 2008 onwards and it is also clear that since the law has been amended so as to disallow any deduction of tax on paid or credited dividends, the issue of setting-off the amount of tax deducted also does not arise.

[9] The position prior to these amendments were pretty much summarised succinctly in *Malaysian Taxation: Principles and Practice*, 14th edn at p. 480, by Chong Kwai Fatt, to which I refer as follows:

The income tax paid by a resident company is fully integrated with the income tax position of shareholders. This income tax paid by the company will be imputed as tax credits to shareholders upon paying, crediting or distributing taxable dividends. When shareholders have nil chargeable income, the tax credit on dividend (which is currently at 27% for YA (year of assessment) 2007) will be totally refunded to them. In short, tax paid by the company will be refunded to the shareholders by means of a tax credit in the event of dividend distribution.

[10] This principle is also known as the tax credit imputation system. The method of calculation is provided under the said provision. The amendments to the ITA 1967 was seen as a complete revamp to this system.

[11] However, transitional provision was inserted into the FA 2007 as regards to this tax credit imputation system whereby it can still be used provided that:

(a) the period of dividend payment is between 1 January 2008 to 31 December 2013;

(b) the company still has a 108 balance or revised 108 balance on the day before the dividend is paid; and

(c) the dividend must be paid in cash.

[12] This can be seen under s. 40 of the FA 2007 which provides as follows:

(1) Where:

(a) a dividend is paid by a company to any of its shareholders at any time **during the period from 1 January 2008 to 31 December 2013**; and

(b) **the company has a 108 balance** or revised 108 balance **on the day before the dividend is paid**, and, if the dividend is deemed by virtue of section 14 of the principal Act to be derived from Malaysia, **the company shall be entitled to deduct tax at the rate applicable to the company** at the date the dividend is paid.

(2) The dividend paid under subsection (1) **shall consist of dividend paid in cash** in respect of ordinary shareholding.

(3) In this Part, "ordinary shareholding" means holding of share other than share which carries only a right to any dividend which is of a fixed amount or at a fixed rate per cent of the nominal value of the shares, or a fixed rate per cent of the profits of the company.

(emphasis added)

[13] While I am still on the point of transitional provision, it is also incumbent to read together s. 51 of the FA 2007 with s. 40 above where it is provided as follows:

(1) **Section 110 of the principal Act, prior to the amendment of that section under this Act, shall apply to a person other than an offshore company** (excluding chargeable offshore company) in respect of any tax deducted under this Part:

Provided that that person **shall not be entitled to any set-off** under that section **if:**

(a) *in the case where section 40 applies, dividend is paid to that person during the period from the date that person acquires the shares from which such dividend is paid to the date of the disposal of such shares* and that *period is less than 90 days*; or

(b) **the dividend paid is not in respect of dividend derived from ordinary shareholding**.

(2) For the purpose of this section:

(a) *any reference in subsection 110(1) of the principal Act prior to the amendment of that section under this Act to "tax which is deducted from any dividend under section 108" shall be construed as references to "tax which is deducted from any dividend under section 40 or 41 of this Part"*;

(b) any reference in subsection 110(13) of the principal Act prior to the amendment of that section under this Act to "tax has been deducted under subsection 108(1) or deemed to have been deducted under subsection 108(2)" and "excess referred in subsection 108(6) or (9)" shall be construed as references to "tax which is deducted or would be deducted under section 40 or 41 of this Act" and "excess in section 48 of this Act" respectively; and

(c) acquisition of shares referred to in paragraph (1)(a) shall not include acquisition of shares in the company listed on Bursa Malaysia.

(emphasis added)

[14] Now that the basic foundation of law regarding both parties' arguments in the present case has been put into perspective, I shall now turn to analyse the facts of the present case.

Brief Facts

[15] The respondent was at all material times a company incorporated under the Companies Act 1965 with the registered address at 1001-1002, 1st Floor, Kompleks Sri Putra, Seberang Jalan Putra, 05150 Alor Setar, Kedah. The respondent was an investment holding company.

[16] As at 30 November 2007, Lim Lian Chew and Chan Chooi Choy (husband and wife) were the company's directors. They were also the shareholders in the company, holding 400 and 300 shares respectively. Another person by the name of Lim Wooi Khai held another 300 shares in the company.

[17] As at December 2007, the respondent held 2.4% of shares in another company, Jelapang Jati Sdn Bhd ("Jelapang Jati") which was earlier transferred by Lim Lian Chew to the respondent.

[18] On 10 December 2007, Jelapang Jati declared an interim dividend to its shareholders and the respondent was entitled at that time to receive a total of RM 1,056,000 gross dividend from Jelapang Jati (hereinafter referred to as the "first interim dividend").

[19] Shortly after, Jelapang Jati had again declared interim dividend to its shareholders and the respondent was then entitled to receive RM80,400 gross dividend from Jelapang Jati (hereinafter referred to as the "second interim dividend").

[20] Therefore, in total, the amount of gross dividend declared by Jelapang Jati to the respondent in 2007 was RM1,136,400.

[21] For the year of assessment of 2007, the respondent's tax due and payable is RM271,119.25.

[22] The respondent expected to get a tax refund amounting to RM35,708.25 calculated under s. 110 of the ITA 1967 (before the amendment). The respondent requested the refund of the same but the appellant refused. It is never a disputed fact that the said money was never released to the respondent.

[23] On 17 February 2008, there was an allotment of shares by Jelapang Jati to the respondent to which the appellant claimed to be the exact same net value as the first interim dividend. This is the core issue and will be discussed later.

[24] Then, there were some correspondences between the appellant and the respondent. The appellant was dissatisfied with the respondent's explanation and proceeded to issue form J and two forms S all dated 9 July 2012 against the respondent.

[25] On 5 August 2012, the respondent filed three forms Q to appeal against the assessments made under the three forms above.

[26] The matter was heard before the SCIT. It was held and ordered as follows:

(a) that the respondent had successfully proven that the gross dividend of RM1,136,400 from Jelapang Jati was credited during the assessment year of 2007;

(b) that the respondent's application for the deduction of their tax under ss. 108 and 110 of the Income Tax Act 1967 (before the amendment) was allowed;

(c) that the respondent had yet to receive the tax refund of RM35,708.75 as stipulated in form J dated 9 July 2012;

(d) all the three forms were set aside; and

(e) the respondent's appeal was allowed.

[27] Dissatisfied with the order by the SCIT, the appellant proceeded to file this appeal.

Issues

[28] Basically the issues raised in this appeal are as follows:

(a) whether the SCIT erred in holding that the payment of both dividends were made on the year of assessment of 2007 and not on 2008; and

(b) whether the SCIT failed to judicially appreciate that the burden of proof lies on the respondent to show that the assessment was excessive or erroneous in which the respondent had failed to discharge.

Principles

[29] First and foremost, an appeal to the High Court against the deciding order of the SCIT is provided under the Fifth Schedule of the ITA 1967.

[30] Under para. 34 of the Fifth Schedule, the following is observed:

> Either party to proceedings before the Special Commissioners **may appeal on a question of law against a deciding order made** in those proceedings (including a deciding order made pursuant to subparagraph 26(b) or (c)) **by requiring the Special Commissioners to state a case for the opinion of the High Court** and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.
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> (emphasis added)

[31] Paragraph 39 of the Fifth Schedule further provides that:

> The High Court **shall hear and determine any question of law** arising on a case stated under paragraph 34 and may in accordance with its determination thereof:
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> (a) order the assessment to which the case relates to be **confirmed, discharged or amended**;
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> (b) remit the case to the Special Commissioners **with the opinion of the court** thereon; or
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> (c) make such **other order as it thinks just and appropriate**.
>
> (emphasis added)

[32] Based on the above, it is crystal clear that the High Court shall only hear and determine questions of law raised in such appeal. The findings of facts by the SCIT, as a trier of facts, shall not, as a general rule, be disturbed.

[33] Lord Diplock in delivering the judgment of the Privy Council in the case of *Chua Lip Kong v. Director-General Of Inland Revenue* [1981] 1 LNS 157; [1982] 1 MLJ 235 had this to say, and I quote at great length:

> Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. **Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself**; occasionally they may be **insufficient to enable the High Court to decide the question of law** sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be **remitted to the Commissioners themselves for further findings**. It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved".
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> From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts,

A and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shewn to have proceeded upon some erroneous assumption as to the relevant law. It is therefore desirable that in a Case Stated the Special Commissioners should set out in a separate paragraph from that which contains their findings of primary facts such
B inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the Court may be able to identify the true nature of the inferences: *viz* - whether they are pure inferences of fact or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were.
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In a Case Stated summaries of the rival contentions of the parties should follow the Commissioners' statement of primary facts admitted or proved and of any inferences that the Commissioners have drawn therefrom in arriving at their decision. The summaries should be restricted to the parties' contentions of law; they should not include, as paragraphs 9 and
D 10 do in the instant case, arguments of the parties directed solely to the reliability of the evidence heard by the Commissioners and inferences of pure fact that ought to be drawn from it. These are not arguments that are for consideration by the court; they deal with matters that are for decision by the Commissioners alone.

E (emphasis added)

[34] The Court of Appeal in the case of *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813; [2013] MLJU 5 also made reference to *Chua Kip Long*'s case and further held as follows:

F **As a general rule finding of facts of trier of facts is rarely disturbed by appellate court more so when it relates to physical facts**. As long as the trier of facts has directed his mind to the relevant issues, and had acted in accordance with the law and the decision passes the test of reasonableness, the finding of facts relating to physical facts will not be ordinarily disturbed notwithstanding the judgment is brief and direct to
G the point. However, when it relates to psychological facts the trier of facts is expected to give more cogent reasons to ensure every aspect of the relevant evidence has been considered in the right perspective to pass the test of reasonableness, [see *Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor* [2003] 2 MLJ 97]. Failure to give sufficient reasons in the grounds of judgment may result in appellate interference. This is evident
H from decided criminal cases and very seldom in civil cases as psychological facts may not be relevant unless it is a probate matter, consisting of issues such as *animus testandi*, undue influence or fraud etc. or in civil cases relating to conspiracy or motive etc. **When it relates to statutory appeals concerning SCIT the test for appellate interference is much stricter** [see *Edwards v. Bairstow & Harrison* 36 TC 207].

I (emphasis added)

[35] Bearing all these principles in mind, I now turn to consider the issues raised by both parties.

Issue 1: Whether Both Dividends Were Paid Or Credited During The Year Of Assessment 2007

[36] The appellant in the present case submitted that the respondent had failed to prove that both the dividends were in fact paid to them during the year of assessment 2007. This failure was due to the non-tendering of the respondent's bank account. This supports the appellant's claim that the dividends were in fact paid by way of an allotment of shares done in 2008. Therefore, the respondent is not allowed to apply for a set-off.

[37] The respondent on the other hand contended that the bank statement of the respondent is of no importance. The wording of the section includes the words "paid or credited". The respondent had called AW2 to give evidence on the audited accounts of the respondent for year 2007. The audited account clearly shows that the total amount of both dividends were shown to have been recognised as revenue in the income statement of year 2007.

[38] Upon careful scrutiny of both parties' submissions, I find that this is an issue involving questions and findings of facts to which the SCIT had directed their mind to.

[39] The SCIT in the stated case had made the following observations at p. 22:

> Now, we have checked the various documentary exhibits that learned Appellant's (the Respondent in the present case) counsel made reference to, and in the absence of any serious objection by learned Revenue counsel to any of them, we have no reason to doubt the authenticity and truthfulness of them. We accordingly find that all documentary exhibits presented by the Appellant in the bundles point to the fact that the dividend transactions happened in the year 2007. In addition, we have no reason to doubt the credit-worthiness of the Accountant (AW2) and we accept AW2's evidence as corroborative at the Appellant's case on his testimony to the effect that dividend declared by Jelapang Jati had been credited into the Appellant's account in 2007 and the total gross dividend of RM1,136,400 is recognised as a revenue in the income statement in year 2007.

[40] I am also in agreement with the findings of the SCIT that the wording of s. 108(1) of the ITA 1967 prior to the amendment made clear mention that dividends were payable either by way of cash or by way of credit. At p. 25 of the case, the SCIT made the following remarks:

> Despite there being no payment of dividend by way of cash in 2007 (there is no dispute on this), yet section 108(1) of the Income Tax Act 1967 (before amendment) which is applicable in the present case under appeal, does provide *inter alia*, that **dividend can be credited by a company such as Jelapang Jati, into the shareholder's account such as the Appellant** (the Respondent in the present case) maintained by Jelapang Jati, based on the opening words in the said section 108(1) as follows:

A Where a dividend is paid or credited by a company to any of its shareholders in the basis period for a year of assessment ...

It is a pity that the Respondent (the Appellant in the present case) had misunderstood that payment of dividend must be by way of cash payment whereas the said section 108(1) has clearly provided that dividend can alternatively be credited into the B *shareholder's account of the Appellant* (the Respondent in the present case) as found in this case.

(emphasis added)

[41] As regards to the appellant's allegation in the present case that the payment of the first interim dividend was made by way of allotment of shares C in year 2008, I have come to a common finding as that of the SCIT that such allegation is "without factual and legal basis and is completely rejected". It was solely based on suspicion.

[42] Therefore, I find that these findings of facts by the SCIT ought not to be disturbed. D

Issue 2: Burden Of Proof

[43] It is also the contention of the appellant in the present case that the SCIT had failed to appreciate the principle that in an appeal against assessment, the burden is on the respondent to prove that the assessment is E excessive or erroneous (see para. 13 of the Fifth Schedule of the ITA 1967).

[44] I have gone through the stated case and found that the SCIT was well aware of the said burden throughout the hearing. I see no reason to hold otherwise. Furthermore, the following observation after careful perusal of all evidence was made by SCIT, that: F

In the upshot we find that the Appellant (the Respondent in the present case) has discharged the onus of proof under para. 13 Fifth Schedule to the Act ...

Conclusion

G **[45]** Therefore, based on all of the above, I hereby dismiss the appellant's appeal with costs RM2,500.

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